Affin Bank Bhd v Major Galaxy Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–1405 OF 2002
VINCENT NG J
21 NOVEMBER 2005

Civil Procedure — Service — Irregularity in service — Personal service on defendant at its registered and business address — Address supplied by defendant at time of signing of banking facilities — Whether service must be made at defendant's residence, permanent or temporary — Practice Note No 1 of 1968

Civil Procedure — Service — Setting aside service — Personal service on defendant at its registered and business address — Address supplied by defendant at time of signing of banking facilities — Whether service must be made at defendant's residence, permanent or temporary — Practice Note No 1 of 1968

The plaintiff had granted banking facilities to the first defendant and the second and third defendants executed a joint and several guarantee as security for the facilities. Upon default in repayment, the plaintiff sent letters of demand to each of the defendants. As the demand was not satisfied, the plaintiff commenced the current proceedings against them. The cause papers were served through personal service on the first defendant at its registered and business address. Upon failure of the first defendant to file the appearance within the prescribed period, the plaintiff entered judgment in default of appearance against it. The first defendant appealed against the senior assistant registrar's ('SAR') dismissal of his application to set aside the default judgment. The first defendant contended that the plaintiff had served the writ of summons at the wrong address, which resulted in the default judgment being irregular. Upon failure of repeated attempts to serve the cause papers through personal service on the second defendant, the plaintiff applied for substituted service. The learned SAR allowed the application, and the second defendant applied to set aside the substituted service order. The plaintiff appealed against the learned SAR's decision in allowing the second defendant's application. The second defendant contended that the service of the writ was invalid as the address was not his residential address where the service of the writ on him ought to have been effected. He based this objection by relying on Practice Note No 1 of 1968, which required two calls to be made at 'the defendant's residence, permanent or temporary, if known'. The plaintiff submitted that the writ of summons was served regularly and lawfully, since it was served at the address, which was given by the second defendant to the plaintiff in the letter of guarantee signed by the former.

Held, dismissing the first defendant's appeal and allowing the plaintiff's appeal:

(1) The then apex court in *Koh Thong Kuang* had clearly pronounced that Practice Note No 1 of 1968 must not to be followed blindly but regard must be had to the facts in each situation. In this case as the second defendant gave the address to the plaintiff, the latter was entirely justified to use the address in

effecting service on the second defendant and it must be presumed that the mode of substituted service employed by the plaintiff was sufficient to bring to the notice of the second defendant the proceeding that had been instituted against him. Thus, the service was proper and was done regularly (see para 7); *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509 followed.

(2) As the place where service was effected was the address provided by the first defendant as its official or registered address, it cannot be argued that the service was improperly effected. The rationale for this is simple; since this was the address furnished by the first defendant, it was incumbent upon it to notify the plaintiff of any change of address, and until so notified this address should remain as its last known address. Clearly, the service was correctly effected and the judgment in default was regular. This being so the first defendant must show that it had defence on the merit, which it had failed to do (see para 12).

(3) The first defendant did in fact make attempts at and proposed terms of settlement with the plaintiff. Though the first defendant's statement of account was given upon request to the second defendant — who was then the Managing Director of first defendant — when he inquired about the first defendant's debt status, the first defendant did not dispute the amount stated in the statement of account at the first instance when it was furnished. It was only after this action was brought that objection was taken by the defendants as to the correctness of the amount claimed. This showed that that the defence put forward by the first defendant was an afterthought (see para 13).

Per curiam:

Practice Note No 1 of 1968 'should not be applied blindly but *mutatis mutandis* the facts of each situation'. The words 'at reasonable hours' in item 3 of para 1 of Practice Note No 1 when calls should be made should not be strictly construed so as to confine such time for calls for service to between 8am and 5pm, but should be construed as a mere bar to making such calls for service of process at odd hours of the night or early morning (see paras 7–8).

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan perbankan kepada defendan pertama dan defendan-defendan kedua dan ketiga telah menyempurnakan satu gerenti bersama dan berasingan sebagai jaminan untuk kemudahan itu. Oleh kerana gagal untuk membuat bayaran balik, plaintif telah menghantar surat tuntutan kepada setiap defendan. Oleh kerana tuntutan tidak dipenuhi, plaintif telah memulakan prosiding semasa terhadap mereka. Kertas-kertas kausa telah disampaikan melalui penyampaian kediri ke atas defendan pertama di alamat berdaftar dan perniagaannya. Defendan pertama telah merayu penolakan penolong kanan pendaftar ('PKP') terhadap permohonannya untuk mengenepikan penghakiman ingkar. Defendan pertama berhujah bahawa plaintif telah menyampaikan writ saman ke alamat yang salah, menyebabkan penghakiman ingkar itu di luar aturan. Oleh kerana gagal membuat

beberapa percubaan untuk menyampaikan kertas-kertas kausa melalui penyampaian kediri ke atas defendan kedua, plaintif telah memohon untuk penyampaian gantian. PKP yang bijaksana telah membenarkan permohonan itu, dan defendan kedua telah memohon untuk mengenepikan perintah penyampaian gantian itu. Plaintif telah merayu terhadap keputusan PKP yang bijaksana dalam membenarkan permohonan defendan kedua. Defendan kedua telah berhujah bahawa penyampaian writ itu tidak sah kerana alamat tersebut bukan alamat rumahnya di mana penyampaian writ ke atas beliau sepatutnya dilaksanakan. Beliau berdasarkan bantahan ini dengan bergantung kepada Nota Amalan No 1 tahun 1968, yang memerlukan dua panggilan dibuat ke 'the defendant's residence, permanent or temporary, if known'. Plaintif berhujah bahawa writ saman telah disampaikan dengan tetap dan sah, memandangkan ia telah disampaikan ke alamat itu, yang telah diberikan oleh defendan kedua kepada plaintif dalam surat gerenti yang ditandatangani oleh defendan kedua.]

Diputuskan, menolak rayuan defendan kedua dan membenarkan rayuan plaintif:

(1) Mahkamah tertinggi dalam *Koh Thong Kuang* dengan jelas menyatakan bahawa Nota Amalan No 1 tahun 1968 tidak patut diikut secara membuta tetapi patut mengambilkira fakta setiap keadaan. Dalam kes ini oleh kerana defendan kedua memberikan alamat itu kepada plaintif, plaintif dijustifikasikan untuk menggunakan alamat itu untuk menyempurnakan penyampaian ke atas defendan kedua dan ia telah beranggapan bahawa cara penyampaian gantian yang digunakan oleh plaintif memadai untuk memberi notis kepada defendan kedua tentang prosiding yang telah dimulakan terhadapnya. Oleh itu, penyampaian itu adalah betul dilaksanakan (lihat perenggan 7); *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509 diikut.

(2) Oleh kerana tempat di mana penyampaian dilakukan adalah alamat yang diberikan oleh defendan pertama sebagai alamat rasmi atau berdaftarnya, ia tidak boleh dihujahkan bahawa penyampaian tidak dilaksanakan dengan berkesan. Rasionalnya mudah, memandangkan inilah alamat yang diberikan oleh defendan pertama, adalah wajib baginya untuk memaklumkan plaintif tentang apa-apa pertukaran alamat, dan sehingga dimaklumkan alamat ini masih kekal sebagai lamat terakhir yang diketahui. Adalah jelas, penyampaian itu dilaksanakan dengan betul dan penghakiman ingkar adalah teratur. Oleh demikian defendan pertama hendaklah menunjukkan bahawa ia mempunyai pembelaan berasaskan merit, yang mana ia gagal untuk berbuat demikian (lihat perenggan 12).

(3) Defendan pertama telahpun membuat percubaan dan mencadangkan terma penyelesaian dengan plaintif. Meskipun penyata akaun defendan pertama telah diberikan atas permintaan defendan kedua — yang pada masa itu Pengarah Urusan defendan pertama — apabila beliau bertanyakan tentang status hutang defendan pertama, defendan pertama tidak mempertikaikan jumlah yang dinyatakan dalam penyata akaun pada mulanya apabila ia dikemukakan. Hanya selepas tindakan ini dimulakan yang mana bantahan telah dibuat oleh

defendan-defendan berhubung kebetulan jumlah yang dituntut. Ini menunjukkan bahawa pembelaan yang dikemukakan oleh defendan pertama telah difikirkan kemudian (lihat perenggan 13).

Per curiam:

Nota Amalan No 1 tahun 1968 'should not be applied blindly but *mutatis mutandis* the facts of each situation'. Perkataan-perkataan 'at reasonable hours' dalam item 3 perenggan 1 Nota Amalan No 1 bila panggilan patut dibuat tidak seharusnya ditafsirkan secara ketat sehingga membatas masa untuk panggilan untuk khidmat tersebut antara pukul 8am dan 5pm, tetapi hendaklah ditafsirkan sebagai batasan untuk membuat panggilan sedemikian untuk khidmat proses itu terlalu lewat malam atau terlalu awal pagi (lihat perenggan 7–8).

Notes

For cases on irregularity in service, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5516–5519.

For cases on setting aside service, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5580–5581.

Cases referred to

Koh Thong Kuang v United Malayan Banking Corp Bhd [1994] 3 MLJ 509 (folld)

MF Wong (Shook Lin & Bok) for the plaintiff.

Suria Kumar (DJ Paul with him) (Suria Kumar & Co) for the first and second defendants.

Vincent Ng J:

BACKGROUND FACTS

[1] The BSN Commercial Bank (M) Bhd — as the plaintiff was formerly known — granted banking facilities to the first defendant. The first defendant accepted the terms of the letter of offers dated 31 March 1997, 28 May 1997, 5 July 1999 and 23 June 2000 and the second and third defendants executed a joint and several guarantee dated 18 September 2000 as security for the facilities. Upon default in repayment, the plaintiff sent letters of demand to each of all the defendants. As the demand was not satisfied, the plaintiff commenced the current proceedings against all the defendants. The cause papers were served through personal service on the first defendant on 28 November 2002 at its registered and business address. On 24 January 2003, upon failure of the first defendant to file the appearance within the prescribed period, the plaintiff entered judgment in default of appearance against it. Upon failure of repeated attempts to serve the cause papers through personal service on the second defendant, the plaintiff applied for substituted service ('SS'). On 19 May 2005, the learned senior assistant registrar ('SAR') allowed the application, and vide encl 29, the second defendant applied to set aside the SS order. Enclosure 63 is the plaintiff's appeal to me against the learned SAR's decision made

on 15 June 2005 in allowing the second defendant's application and encl 38 is the first defendant's appeal against the SAR dismissal of his application to set aside the default judgment. I shall deal with the two appeals separately.

THE PLAINTIFF'S APPEAL

[2] The plaintiff obtained the SS order from the court to serve the cause papers on the second defendant at address No 8-2, Jalan Wangsa Setia 4, Wangsa Melawati, 54200, Kuala Lumpur, on 10 July 2003. It is not disputed that service was effected at this address.

[3] The second defendant contends that the service of the writ was invalid as the said address is not his residential address and his actual residential address is No 90, Jalan AU5, Taman Lembah Keramat, 54200 Kuala Lumpur, where the service of the writ on him ought to have been effected. He based this objection by relying on Practice Note No 1 of 1968, which required two calls to be made at 'the defendant's residence, permanent or temporary, if known'.

[4] The plaintiff submitted that the writ of summons was served regularly and lawfully, since it was served at the address, which was given by the second defendant to the plaintiff in the letter of guarantee signed by the former. And, as the second defendant did not at any time inform the plaintiff any changes in respect of his address, he cannot now complain that the service of writ of summons is bad and wrong in law.

[5] For ease of reference, the Practice Note No 1 of 1968 stipulates as follows:

> Application for Substituted Service in the High Court in Malaya
>
> The practice governing applications for substituted service in the High Court in Malaya shall follow that in the High Court in England, as provided for in O 10 r 2 of the Rules of the Supreme Court 1975. The practice, taken from the 1957 White Book, p 88, is here reproduced:
>
> 1) Two calls should be made.
> 2) The calls should be made at the defendant's residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelop addressed to the defendant.
> 3) The calls should be made on weekdays and at reasonable hours.
> 4) Each call should be on a separate day.
> 5) The second call should be made by appointment by letter sent to the defendant by ordinary prepaid letter post, giving not less than two clear days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.
> 6) On keeping the appointment, the process server should inquire whether the defendant has received the letter of appointment with the copy document, and if it is stated that the defendant, is away, inquiry should be made whether or not letters are being, or have

been forwarded to an address within the jurisdiction; the object is to show that the defendant has received communications sent to him.

7) The affidavit in support of the application should deal with all the foregoing requirements and should further state whether the letter of appointment has been returned or not, and any answer received should be exhibited. A copy of the document to be served should accompany the affidavit.

No prescribed form is necessary for the letter of appointment.

The letter of appointment should ordinarily be sent by the solicitor for the plaintiff after ascertaining from the process servers in the High Court and other courts their available times and dates from the second call. The facts regarding the letter of appointment should be stated in the affidavit in support.

Compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such a statement should never be sufficient to apply for an order for substituted service. If the above practice is followed as required by the Rules of the Supreme Court 1957, the efforts which have been made to find the defendant and the reasons for believing that he is keeping out of the way to avoid service will be before the Senior Assistant Registrar/Assistant Registrar before the order is made.

(Au Ah Wah)

Registrar

The High Court Registrar,

The Law Courts,

Kuala Lumpur

10 June 1968

[6] In *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509 ('*Koh Thong Kuang*'), a Supreme Court's decision, the appellant was sued on a guarantee given to the respondent ('the bank'). The bank first obtained judgment against the appellant and, subsequently, an order for substituted service of the bankruptcy notice. In the letter of guarantee, the appellant's address was given as No 146, Jalan Maarof, Bangsar, Kuala Lumpur. The petitioner obtained an order for SS of the bankruptcy notice, pursuant to which, service was effected on the appellant by, inter alia, posting a copy of the notice and of the order for SS on the notice board of the court and also on a conspicuous part of the premises known as No 146, Jalan Maarof, Bangsar, 59000 Kuala Lumpur, the last known address of appellant (ie the judgment debtor) given by the appellant in the letter of guarantee. Two days after the substituted service was effected, the appellant applied to set aside the bankruptcy notice on the ground that the order for substituted service had been improperly obtained because the bank was aware, as the result of previous bankruptcy proceedings brought against him, that he had resided in England for the preceding six years. The application was dismissed by the senior assistant registrar and also by the judge on appeal. The appellant then took the matter further to the Supreme Court, which dismissed the appeal and held (at p 513) as follows:

In the instant case, as has been seen, the evidence available to the bank and its solicitors was that the appellant had addresses both in England and in Malaysia and was frequently

traveling from Malaysia to England and back to Malaysia or vice versa. It would seem that an advertisement in either the English or Malaysian newspapers would in all probability have been equally effective to give him notice of the proceedings. As it turned out the appellant had been aware, within two days of the effective date of the SS of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support by which he sought to have it set aside. *This demonstrates the efficacy of the SS procedures provided by the rules and streamlined as it were by Practice Note No 1 of 1968 which we would exhort should be applied not blindly but mutatis mutandis the facts of each situation.* (Emphasis added.)

[7] Thus, the then apex court had clearly pronounced that Practice Note 1 of 1968 must not to be followed blindly but regard must be had to the facts obtaining in each situation. In *Koh Thong Kuan*, the court pronounced the substituted service, which was effected at the address given by the appellant in the letter of guarantee, to be valid. The facts of that case and the present case are almost similar. In this case as the second defendant gave the said address to the plaintiff the latter is entirely justified to use the said address in effecting service on the second defendant and it must be presumed that the mode of substituted service employed by the plaintiff is sufficient to bring to the notice of the second defendant the proceeding that has been instituted against him. Thus, I would hold that the service was proper and was done regularly. The plaintiff's appeal in encl 63 is allowed with cost.

[8] On the perennial issue of service of process, I would make the following comments. Bearing in mind that the whole purpose of the need for service of process upon the opposite party is to ensure that he is aware of the process or proceedings against him, and as we have now arrived at the era of communications and transactions through the electronic media, for example, e-mail, facsimile, multimedia messaging services, E-Syariah, and video conferencing, it is, in my opinion, high time that we heed the prescient exhortation of the Supreme Court in *Koh Thong Kuan* that Practice Note No 1 of 1968 'should not be applied blindly but mutatis mutandis the facts of each situation' and consider an update of this Practice Note. My further view is that the words 'at reasonable hours' in item 3 of para 1 of Practice Note No 1 above when calls should be made should not be strictly construed so as to confine such time for calls for service to between 8am and 5pm, but should be construed as a mere bar to making such calls for service of process at odd hours of the night or early morning.

THE FIRST DEFENDANT'S APPEAL

[9] In encl 32, the first defendant applies for the following prayers:

(i) for a stay of execution of the default judgment dated 24 January 2003 obtained by the plaintiff against it

(ii) for leave to make the application out of time;

(iii) that the default judgment be set aside;

(iv) for leave to file statement of defence.

[10] The first defendant claims it came to know for the first time about the default judgment when the plaintiff advertised the winding up petition in The Star

newspaper. Its affidavit in support states that it had ceased business operation at the premises known as No 8-2, Jalan 4/24D, Wangsa Melawati, 53300 Kuala Lumpur. And, that its registered address was at No 79A, Jalan SG 3/10, Pusat Bandar Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan, but there were other companies also sharing the said premises and address. It thus contends that the plaintiff had served the writ of summons at the wrong address, which resulted in the default judgment being irregular. The first defendant also disputed the sums claimed by the plaintiff, and alleged that the plaintiff refused and neglected to deduct, from the sums claimed, the amount recovered by the plaintiff through liquidation of securities made in favour of the latter.

[11] The plaintiff in its affidavit in opposition (encl 36) states that the service of the writ of summons was effected regularly. Service of the writ was made at the first defendant registered office at No 79A, Jalan SG 3/10, Pusat Bandar Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan as well as at No. 8-2, Jalan 4/2D, Wangsa Melawati, 53300 Kuala Lumpur, which was the first defendant's business address. The plaintiff disputed the first defendant's allegation that the sums claimed were wrong, since the plaintiff had utilized all the proceeds from the sale of the securities to reduce the first defendant indebtedness. And, all payments received on behalf of the first defendant had been taken into account to reduce the first defendant's outstanding debts. Upon a study of the relevant documents exhibited by the plaintiff, I find this to be true.

[12] Evidence adduced by the plaintiff on the official search at Suruhanjaya Syarikat Malaysia revealed that the first defendant's registered address was in fact No 79A, Jalan SG 3/10, Pusat Bandar Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan. Furthermore, the first defendant did not deny that the said address was its registered address. Consequently, I would hold that as the place where service was effected was the address provided by the first defendant as its official or registered address, it cannot be argued that the service was improperly effected. The rationale for this is simple; since this was the address furnished by the first defendant, it is incumbent upon it to notify the plaintiff of any change of address, and until so notified this address should remain as its last known address. Clearly, the service was correctly effected and the judgment in default is regular. This being so the first defendant must show that it has defence on the merit, which it has failed to do.

[13] Furthermore, averments in the plaintiff's affidavit in encl 36 show that the first defendant did in fact make attempts at and proposed terms of settlement with the plaintiff. We have also to be mindful that though the first defendant's statement of account was given upon request to the second defendant — who was then the managing director of first defendant — when he inquired about the first defendant's debt status, the first defendant did not dispute the amount stated in the statement of account at the first instance when it was furnished. It was only after this action was brought that objection was taken by the defendants as to the correctness of the amount claimed. This in my opinion shows that that the defence put forward by the first defendant is an afterthought.

[14] Based on the above facts, I am entirely satisfied that the learned SAR had correctly rejected the first defendant's application in encl 32. In the event, encl 38 is dismissed with cost.

Plaintiff's appeal allowed. First defendant's appeal dismissed.

Reported by Loo Lai Mee